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No. 09-769

Supreme Court, U.S.
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In The
Supreme Court of the United States

DIAMOND OFFSHORE DRILLING, INC.,

Petitioner,

versus

JIMMY LEWIS,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

REPLY BRIEF

MICHAEL P. MENTZ
Counsel of Record
ALAYNE R. CORCORAN
HAILEY, MCNAMARA, HALL, LARMANN & PAPALE, L.L.P.
One Galleria Boulevard – Suite 1400
Metairie, Louisiana 70001
Telephone: (504) 836-6500

LAURA P. HALEY
15415 Katy Freeway
Suite 300
Houston, Texas 77094
Telephone: (281) 647-2180

-and-

ANTONIO CLAYTON
607 North Alexander Street
Port Allen, Louisiana 70767
Telephone: (225) 344-7000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MAY IT PLEASE THE COURT:

Petitioner, Diamond Offshore Drilling Inc. (hereinafter "Diamond"), respectfully submits this brief reply to respond to the opposition filed by respondent, Jimmy Lewis. Although petitioner takes issue with the *entire* premise of plaintiff's opposition, most of the arguments have been sufficiently addressed and properly refuted in Diamond's original Petition for Writ of Certiorari. However, several specific new issues raised by respondent in his opposition, most particularly his "Statement of the Case", are so blatantly erroneous and misleading that they must be addressed herein.

1. Writ Worthy Issues Presented

Under Rule 10 of this Honorable Court, review on a writ of certiorari is a matter of judicial discretion which is appropriate when a state court of last resort has decided important federal issues in a way that conflicts with United States court of appeals. As is set forth in petitioner's original writ, this is precisely the case here. Although respondent claims that there are, allegedly, "no writ worthy" issues presented because the standard of review on causation is narrow under the Jones Act, this has *no* legal bearing on the issues before this Court. Quite simply, the Louisiana Court erroneously confused the standard regarding burden of proof in a Jones Act case with the standard for admissibility of evidence. As has been held by the Second, Fifth, Sixth and Ninth Circuits, the standard

of proof of the former in no way relaxes or changes the admissibility standard of the latter.[1] Moreover, the Louisiana Court has completely misapplied general maritime law, which does *not* allow an award for maintenance and cure for an *incurable* disease. This Court has consistently held that there is no obligation to pay maintenance and cure when a seaman's condition is incurable. *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707 93 L.Ed. 850 (1949). General maritime law has also consistently held that there is no obligation to pay cure into the *future*. The Louisiana Court also committed clear error and violated general maritime law principles by failing to offset expenses paid by others when the seaman has not contributed to those expenses. Thus, the state courts' direct violation of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 1135 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the Jones Act, the erroneous interpretation and misapplication of general maritime

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[1] As held in *Seaman v. Seacor Marine, L.L.C.*, 2009 WL 115879 (5th Cir. 4/30/09) held: "The reduced burden of establishing proximate cause in Jones Act cases, *see, e.g., Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975) (describing the burden as "featherweight"), is irrelevant to our holding. The standards of reliability and credibility to determine the admissibility of expert testimony under *Daubert* and Rule 702 apply regardless whether a seaman's burden on proximate causation is reduced. *See Wills v. Amerada Hess Corp.*, 379 F.2d 32, 47 (2nd Cir. 2004) (stating this rule and emphasizing that the Federal Rules of Evidence and the applicable standard of causation are "distinct issues and do not affect one another") (quotation omitted)."

law for *future* cure, and the manifestly erroneous award of maintenance and cure for an *incurable* disease, necessitate careful review and clearly present "writ worthy issues" in the instant case.

2. "Law of the Case" Doctrine is Inapplicable

In his opposition, respondent claims that the law of the case doctrine precludes supervisory review of the *Daubert* issue presented by Dr. Russell Jaffe's purported expert testimony because the issue was, allegedly, "settled long ago." This claim has no basis in Louisiana law. Once the trial court erroneously ruled that Dr. Jaffe's improper testimony was admissible, petitioner filed an Application for Supervisory Writs with the Louisiana Fourth Circuit Court of Appeal. The appellate court did not rule on the issue but simply ***denied*** the writ. Generally, under Louisiana law, when an appellate court reviews and considers arguments made in a supervisory writ application, the court's disposition on the issue considered becomes the "law of the case" foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. *Diamond B Const. Co., Inc. v. Department of Transp. and Development*, 02-0573 (La. App. 1 Cir. 2/14/03) 845 So.2d 429, 434, citing *Easton v. Chevron Indus., Inc.*, 602 So.2d 1032, 1038 (La. App. 4 Cir. 1992). However, the ***denial*** of a writ application creates a totally different situation. A denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction, and it does *not* bar reconsideration of, or a different

conclusion on, the same question when an appeal is taken from a final judgment. *Id.*, citing *Dupre v. Maynard*, 96-1183 (La. App. 1 Cir. 3/27/97) 692 So.2d 36. The "law of the case" principle is merely a *discretionary* guide, as acknowledged by the state appellate court in the case at bar. (*See* App. 11, attached to original petition). It should *not* be applied mechanically as to accomplish manifest injustice, as in the case at bar. *See e.g., Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 256 So.2d 105 (La. 1972).

3. Plaintiff Agreed With SIBM Diagnosis and His Expert Opined that Heavy Metal Poisoning Caused Plaintiff's SIBM

Despite his assertions to this Honorable Court, during the course of this litigation, plaintiff never disputed his diagnosis of sporadic inclusion body myositis ("SIBM"). The undisputed evidence contained in the record establishes that Mr. Lewis first became symptomatic in ***1991*** – years before going to Venezuela to work for ODECO and before he even became a Diamond employee in 1992. The uncontroverted testimony of *all* of the doctors was that SIBM is a very slow, progressive neuromuscular disease that develops over many years before it becomes symptomatic. This testimony, which was *not* contested by plaintiff on appeal, was that Mr. Lewis had SIBM for at least five (5) years before going to Venezuela and at least six (6) years *before* he even began his employment with Diamond in 1992. As

such, the diagnosis of SIBM is, in fact, fatal to his claim against Diamond.

4. No Evidence of Exposure to Heavy Metals or Toxins

Although plaintiff has tossed about a number of purely speculative theories regarding causation,[2] he seems to have settled, for purposes of his opposition, on an oil-based mud compound used in drilling, commonly referred to as Soltex. In his opposition, respondent argues that oil-based drilling mud was "dumped over" the side of the rig near the vessel's water intake. Now according to Mr. Lewis, *this* is what allegedly caused his disease.

The record reveals that plaintiff has consistently asserted that within a few days of arriving in Venezuela and boarding the OCEAN SPARTAN, he "began to suffer from diarrhea and nausea." He further claims that these symptoms continued "during his entire thirty day hitch in Venezuela." Mr. Lewis has stated in the record that his symptoms would cease when he went home to New Orleans, but that the diarrhea and nausea would begin again *immediately* upon his return to Lake Maracaibo.

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[2] Plaintiff has alleged that any number of things caused his neuromuscular disease, ranging from viruses, food, water, Barite and Mercury. None of these theories could be proven and were, apparently, abandoned by plaintiff in favor of his latest theory regarding Soltex, an oil-based mud compound.

However, this cannot be linked to oil-based drilling mud. First of all, the record does *not* contain any evidence that Soltex was actually used aboard the OCEAN SPARTAN.[3] Secondly, even if it could be established that Soltex was used in the drilling process, the record does *not* show exactly *when* the compound was allegedly used. As the evidence presented at trial established, thirteen (13) wells were drilled by Diamond in Venezuela.[4] However, according to IADC drilling reports, *only two (2) of the thirteen (13) wells* drilled by the OCEAN SPARTAN required oil-based mud and then only for a *limited amount of time*. All of the other wells in operation while Mr. Lewis was assigned to the rig in Venezuela were ***water-based***, meaning that Soltex was *not* used. The testimony given at trial established that on the limited occasions when oil-based mud was used, it was pumped into the tanks on barges next to the rig. The OCEAN SPARTAN contained pollution rails around the hoppers that would catch the overflow of any mud. James Chatham, a Diamond derrickman called by plaintiff in his case in chief, testified that there *never* was any problem with any oil-based mud,

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[3] There is also no evidence that the oil-based mud used in Venezuela was any different than that used by drilling operations in the Gulf of Mexico. Mr. Lewis admittedly *never* got sick when he worked in the Gulf, only allegedly in Venezuela.

[4] The IADC drilling reports were analyzed by Calvin Barnhill, defendant's expert on drilling operations, and contained the names of all Diamond personnel aboard the rig. They were *not* contradicted by plaintiff.

and that he could *not* recall ever dumping any oil-based mud in the lake. Although small amounts of mud may have washed overboard, the oil-based mud was typically vacuumed off the drill floor and discharged onto one of the barges tied adjacent to the rig. In contrast, the ***water-based*** mud, which is considered environmentally friendly, could be hosed overboard. It is not uncommon to dump water-based mud overboard, which is routinely done throughout the industry.

Significantly, the first well that used ***oil-based*** mud was well number 4. Diamond did not even begin using the oil based mud until August 1992 – *seventeen (17) months after* the rig was moved to Venezuela. It was not disputed at trial that plaintiff was only aboard the rig twenty (20) days during the time well number 4 was in operation. The other well that used oil-based mud was well number 7. Oil-based mud was used in conjunction with this well between March – August 1993. During that time, Mr. Lewis *only* worked one (1) single 28-day hitch. This is significant because Mr. Lewis claims that he got sick and started having symptoms *immediately*, as soon as he got to Venezuela, and that these symptoms continued the *entire* time for *every* hitch he ever had on Lake Maracaibo. However, only two (2) of the wells in operation *ever* used oil-based mud, and Mr. Lewis was only aboard for a limited time during each operation. Thus, the facts simply do *not* support his vague claim that the he was "poisoned" with heavy

metals that made him sick the *entire* time during *each and every* 30-day rotation he had aboard the rig.

5. No Evidence that Water Making System was Faulty

In his "Statement of the Case", respondent insinuates that the water making system aboard the rig was somehow to blame. This is illogical.[5] As the record establishes, the Alpha Naval water making system was *not* used when the OCEAN SPARTAN initially went to Venezuela. Potable water was sent out to the rig on barges and pumped into the potable water tanks aboard the rig. Any diarrhea or illness that plaintiff initially experienced when he first went to Venezuela could *not* have been caused as a result of water that was coming from the water maker unit. Further, there were no instances where lake water was pumped directly into the potable water tank. Felix Noel, the motorman aboard the rig, who was responsible for maintaining the Alpha Laval water making system could not recall a single instance where lake water flowed directly into the potable water tank. Wade Reasons, the offshore installation manager and person ultimately responsible for operations aboard the rig, corroborated the testimony

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[5] Notwithstanding plaintiff's faulty theory, if there was a problem with the water maker, which is specifically denied and contrary to the facts of this case, such would necessarily constitute an unseaworthy condition of the rig. The jury concluded no unseaworthy condition caused plaintiff's illness.

of Mr. Noel that prior to water being consumed aboard the rig, it went through five (5) filters as it left the potable water tanks and was also subject to a sterilization process. When asked if he was aware of lake water *ever* being pumped directly into the potable water tanks, Mr. Reasons stated emphatically, "that has never happened." Significantly, the witness testimony was *not* disputed that, prior to the water maker system being used in Lake Maracaibo, the water was tested and analyzed not once, not twice, but on three (3) separate occasions.

6. Plaintiff's Tests for Heavy Metals Were Within NORMAL LIMITS

Even though plaintiff did *not* prove that he contracted SIBM from heavy metal exposure *or* toxins that were *ever* present aboard the vessel at issue, the record establishes that tests for heavy metals in his system negated his speculative theory. To the contrary, Dr. William George, Director of Toxicology at Tulane University, testified that the tests performed on plaintiff at Ochsner in May 1998 (only two (2) years after he voluntary left Diamond) were all well within ***normal* limits**. Mr. Lewis simply did *not* have elevated levels of heavy metal in his system. In fact, all of the diagnostic tests there were done to check Mr. Lewis' level of heavy metals, even the ones done with chelation at the request of his alleged expert, Dr. James Carter, were within ***normal* limits**. It is significant to note that because plaintiff could *not* prove causation as to SIBM, he now claims

that the "true" cause of his illness is the alleged dose of heavy metals he allegedly ingested aboard the rig. This is patently false. As the record establishes, at no time during this trial did Mr. Lewis *ever* dispute his well-established diagnosis of SIBM, which was made by multiple doctors including those treating Mr. Lewis. His suggestion before this Honorable Court that his neuromuscular disease is anything other than SIBM is inconsistent with the undisputed trial testimony of Plaintiff's experts. Nonetheless, the argument that his neuromuscular disease was "caused" by heavy metals is flawed as there is *no* evidence that he *ever* had elevated levels of heavy metal in his system.

7. Unproven Theory Only Allegedly Applies to this Particular Plaintiff

At trial, the plaintiff presented nothing but *pure speculation* from alleged "experts" who have, admittedly, *never* previously treated anyone with SIBM. Although plaintiff's purported medical experts, Drs. Carter and Jaffe, acknowledged that the cause and treatment of SIBM is ***unknown*** (much like Lou Gehrig's disease), they had the audacity to claim that they alone "figured out" what caused *this particular plaintiff* to contract SIBM and that they could treat *this particular plaintiff* – but that their theory did not apply to *any* other SIBM patient. Thus, the "expert" testimony offered by these clearly unqualified testifying experts fails under *Daubert* and therefore amounts to *no* evidence of causation, even under the

low threshold causation standard applicable in Jones Act cases. As confirmed in Plaintiff's Opposition, his expert, Russell Jaffe, opined that Plaintiff's paralysis *was caused by SIBM* (p.12 Pl. Opp.) and that SIBM was caused by heavy metal poisoning (p.11 Pl. Opp.). However, Plaintiff's expert's testimony fails under *Daubert* precisely because, as noted by Plaintiff in his brief, Dr. Jaffe was not familiar with SIBM before meeting Plaintiff and his testimony regarding causation is speculative ("toxic metals at the level Mr. Lewis was exposed to them *might well have under certain conditions* accumulated in him . . . " (p.11 Pl. Opp.)).

Unbelievably, on page 15 of his opposition, respondent alleges that Dr. Jaffe was called on to study the "*specifics* of Mr. Lewis' case . . . " (emphasis added). According to respondent, while he is not qualified to testify as an expert on SIBM, Dr. Jaffe is allegedly an expert on the effect of heavy metals. Notwithstanding the fact that there was *no* evidence presented regarding exposure to heavy metals aboard the rig *or* the existence of alleged heavy metals in plaintiff's system, the law prohibits such unsupported conjecture. For example, in *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007), the court noted that there is a two-step process in examining the admissibility of causation evidence in toxic tort cases: first, whether there is admissible *general causation* evidence; and, if so, where there is admissible *specific causation* evidence. *Id.* "General causation is whether a substance is capable of

causing a particular injury or condition in the **general population**, while specific causation is whether a substance caused a particular individual's injury." (Emphasis added) *Id.* (citations omitted).[6] **Evidence concerning specific causation is admissible *only* as a follow-up to admissible general-causation evidence**. *Id.* Here, there are absolutely *no* studies or evidence regarding *general causation* as theorized by plaintiff.[7] Instead, the studies on which Plaintiff's expert relied (and cited in his Opposition) were not studies about SIBM or even the type of inclusion body myositis with which he diagnosed Plaintiff (p.13 Pl. Opp.). Even if the Court were to reach the issue of specific causation, Plaintiff's expert failed to prove specific causation when he could not offer the length or amount of exposure to the alleged heavy metals that caused Plaintiff's SIBM and how that exposure was similar to other cases of SIBM (p.12 Pl. Opp.). Thus, in setting out Plaintiff's evidence of causation, Plaintiff's Opposition demonstrates the specific expert testimony that fails to meet standards for admissibility of expert testimony.

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[6] *See also Seaman v. Seacor Marine, L.L.C.*, 2009 WL 115879 (5th Cir. 4/30/09) and *LeBlanc v. Chevron USA, Inc.*, 2007 WL 1772057 (E.D.La. 6/18/07).

[7] Rather, the only study even mentioned in the record is an irrelevant study from Sweden that has absolutely nothing to do with plaintiff's theory that heavy metals could cause SIBM.

Accordingly, for the reasons set forth above, as well as those contained in the original Petition for Writ of Certiorari, Diamond Offshore Drilling Inc. prays that its writ will be granted by this Honorable Court.

Respectfully submitted,

MICHAEL P. MENTZ
Counsel of Record
ALAYNE R. CORCORAN
HAILEY, MCNAMARA, HALL,
LARMANN & PAPALE, L.L.P.
One Galleria Boulevard –
Suite 1400
Metairie, Louisiana 70001
Telephone: (504) 836-6500

LAURA P. HALEY
15415 Katy Freeway
Suite 300
Houston, Texas 77094
Telephone: (281) 647-2180

-and-

ANTONIO CLAYTON
607 North Alexander Street
Port Allen, Louisiana 70767
Telephone: (225) 344-7000